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No. 01-1059

IN THE

Supreme Court of the United States

ROBERT J. MATZ, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. THE RULE GIVING DEFERENCE TO AN AGENCY'S INFORMAL REGULATORY INTERPRETATION IS NOT LIMITED TO ONLY THOSE SITUATIONS WHERE THE REGULATORY SCHEME IS HIGHLY DETAILED.

For the first time, Respondent argues that this Court's well-established rule that an agency's reasonable and consistently held interpretation of its own ambiguous regulation is controlling and should be given substantial deference applies *only* when the regulatory scheme is lengthy, "highly detailed," and establishes "specific definitional tests and rules." Response, p. 22. There is absolutely *no* basis for this argument, as this Court has never stated, indicated or even implied that its stated standard of deference apply only when the regulatory scheme at issue is highly detailed and provides specific definitional tests and rules.[1] The proposition that this Court *actually* meant for deference to be granted only in the circumstances suggested by Respondent – although there is not a scrap of evidence in any of this Court's decisions to support such a proposition – is incredulous. Petitioner presumes that had this Court intended such a standard of deference, this Court would have actually said so in one of the many decisions addressing this issue. The fact that this Court has never adopted this standard is concrete and irrefutable proof that it does not exist.

Rather, the only requirements placed on the rule's applicability are that (i) the regulation be ambiguous as to

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1. Indeed, Petitioner submits that such a test would be highly subjective and would provide a court with virtually no standards. Because every court could feasibly have a different opinion as to what constitutes "highly detailed," there could be innumerable conflicting interpretations of the same regulation.

the issue in question, (ii) the agency's interpretation be reasonable, and (iii) the agency's interpretation be consistent with previous agency rulings. *United States v. Cleveland Indians Baseball Co.*, 352 U.S. 200, 220-21, 121 S. Ct. 1433 (2001); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905 (1997); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381 (1994); *Stinson v. United States*, 508 U.S. 36, 44, 113 S. Ct. 1913 (1993).

This test is easily met here. First, the partial termination regulation does not address whether fully vested participants are included in a partial termination analysis, and, as the Seventh Circuit previously found, it is ambiguous on this issue. App. 6a, 18a. Second, as was also previously found by the Seventh Circuit, the Internal Revenue Service's ("IRS") interpretation, which requires the inclusion of all terminated plan participants in the partial termination analysis, is reasonable. App. 18a-19a. Finally, the IRS' interpretation has been consistently applied since 1990, with no challenge by any party (other than Respondent) or ruling letter, opinion or case holding to the contrary. *Weil v. Retirement Plan Admin. Comm. of the Terson Co., Inc.*, 933 F.2d 106, 110 (2d Cir. 1991);[2] Internal Revenue Manual, Subsection 7753 § 252(7) (1990).

Because the IRS' interpretation meets all of the above requirements, it should control and should have been deferred to by the Seventh Circuit. The failure to defer to the IRS' interpretation of its own regulation would allow litigants to challenge the IRS' administration of the tax laws, including

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2. Despite Respondent's continued implication to the contrary, the IRS was not a litigant in *Weil*. Rather, the Second Circuit specifically requested that the IRS submit an *amicus curiae* brief to provide the Court with the IRS' interpretation, and analysis and reasoning of that interpretation, of the partial termination statute and partial termination regulation. *Weil*, 933 F.2d at 107.

its regulatory interpretations, down to the minutia.[3] Clearly, this is a far-reaching issue which needs to be resolved by this Court.[4]

II. EVEN IF THE RULE APPLIES ONLY TO HIGHLY DETAILED REGULATORY SCHEMES, THE REGULATION AT ISSUE MEETS THAT STANDARD.

Even if this Court did intend for the rule to apply only where the regulatory scheme at issue is highly detailed and specific, the partial termination regulation here meets those requirements since it is not substantively different in scope and depth than the regulations at issue in *Auer* or *Cleveland Indians*. Furthermore, to assert that the regulatory scheme governing qualified benefit plans is *not* lengthy or highly detailed and does not establish specific definitional tests and rules is preposterous.

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3. Every detail of the IRS' interpretation will be open to dispute. For example, despite the Seventh Circuit holding to the contrary (App. 7a), Respondent *continues* to argue that involuntarily terminated fully vested plan participants are excluded from the numerator, but included in the denominator, of the partial termination analysis. This argument, and Respondent's willingness to keep pressing it, is further evidence that the details and interpretation of a regulation are better left to the agency who drafted the regulation. Otherwise, numerous different rules will be spawned by the same regulatory language.

4. Petitioner respectfully suggests that because the IRS' ability to effectively administer the tax laws is impacted by the issues raised herein, this Court consider inviting the IRS to file an *amicus curiae* brief in order to aid the Court in its consideration of the Petition for a Writ of Certiorari.

In *Auer*, the relevant statute provided that certain types of employees were exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA"). The relevant regulations provided that to be exempt, the employee must be paid on a salary-basis, and further provided that an employee is not paid on a salary-basis if the salary is "subject to" reduction for variations in quality or quantity of work performed. *Auer*, 519 U.S. at 455. Thus, the regulation sets forth a "salary-basis" test, along with the elements to be considered in the test. That is the depth, scope and detail of the regulation at issue in *Auer*. In its *amicus curiae* brief to this Court in *Auer*, the U.S. Department of Labor ("DOL") set forth its interpretation with regard to one element, *i.e.*, the "subject to" element, of the test. *Id.* at 461. This Court stated that because the "salary-basis" test was a creature of the DOL's own regulation, the DOL's interpretation was controlling unless plainly erroneous or inconsistent with the regulation. Finding that the interpretation was reasonable, this Court deferred to the DOL's interpretation of the "subject to" element of the test. *Id.*[5]

The partial termination regulation is similar to the *Auer* regulation in depth, scope and detail. The partial termination regulation provides that whether or not a partial termination of a qualified plan occurs shall be determined with regard to "all the facts and circumstances." Treasury Regulation

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5. The regulations at issue in *Cleveland Indians* provide even *less* depth, scope and detail, yet this Court still granted deference. There, the regulations provided that the employer tax attaches "at the time that the wages are paid." *Cleveland Indians*, 532 U.S. at 219. The regulations set forth no elements or circumstances to consider, but just set forth this basic rule. The IRS had issued informal rulings as to when backpay would be considered "paid," and this Court granted deference to those rulings. *Id.* at 220.

§ 1.411(d)-2(b)(1). The partial termination regulation goes on further to set forth some of the elements which are to be considered, one of which is "the exclusion, by reason of . . . severance by the employer, of a group of employees who have been previously covered by the plan." *Id.* Thus, the partial termination regulation sets forth a "facts and circumstances" test, along with the elements to be considered in the test. In its *amicus curiae* brief to the *Weil* Court, the IRS set forth its interpretation with regard to one element of the test – whether the term "group of employees who have been previously covered by the plan" includes vested as well as non-vested employees. Similar to the DOL rule at issue in *Auer*, the IRS rule at issue here answers a specific narrow question on a specific narrow issue. Here, the matter at issue under the regulation (*i.e.*, whether vested employees are counted in the partial termination analysis) is as specific and detailed as the matter at issue in *Auer*.

The "facts and circumstances" test set forth in the partial termination regulation is a creature of the IRS' own regulation. Therefore, the IRS' interpretation (as set forth in the *amicus curiae* brief) of one element of the test described in the regulation is, under this Court's jurisprudence, controlling unless plainly erroneous or inconsistent with the partial termination regulation – which it is not.

III. THIS COURT'S DECISIONS IN *MEAD*, *AUER* AND *UNITED STATES v. CLEVELAND INDIANS BASEBALL CO.* DISTINGUISH BETWEEN THE DEFERENCE ACCORDED TO AN AGENCY'S INTERPRETATION OF A REGULATION AND THAT ACCORDED TO AN AGENCY'S INTERPRETATION OF A STATUTE.

Respondent argues further – for the first time – that neither *United States v. Mead*, 533 U.S. 218, 121 S. Ct. 2164 (2001), *Auer* nor *Cleveland Indians* "makes any distinction between the analysis appropriate for an agency's interpretation of a regulation, rather than a statute." Response, p. 19. Such an argument is completely without merit and contrary to the express language of *Mead*, *Cleveland Indians* and *Auer*.

Although Respondent claims that *Mead* involved the construction of two regulations and a statute, that simply is not true. In *Mead*, the issue was whether the tariff classification made by the U.S. Customs Service ("Customs Service") under the Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1202, was entitled to judicial deference. *Mead*, 121 S. Ct. at 2168. The Customs Service had issued a letter ruling determining that the imports at issue fell within a certain tariff classification under the HTSUS. In response to the importer's challenge of the classification, the Customs Service invoked *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), asserting that its interpretation of the HTSUS, as set forth in the letter ruling, deserved *Chevron* deference. In its analysis, this Court focused solely on the issue of statutory interpretation, and, as specifically emphasized by Justice Scalia in his dissent, did *not* disturb this Court's

previous ruling that an agency's interpretation of its own ambiguous regulation was entitled to deference. *Mead*, 121 S. Ct. at 2171, 2181. Clearly, the *Mead* Court distinguished between regulatory and statutory interpretations.

Furthermore, although Respondent asserts that *Mead* involved the interpretation of two regulations – 19 C.F.R. § 177.8 and 19 C.F.R. § 177.9 – that also is not true. These regulations merely give the Customs Service the authority to issue letter rulings setting tariff classifications under the HTSUS. *Mead*, 121 S. Ct. 2168-69. The letter ruling at issue in *Mead*, the issuance of which was expressly authorized under the regulations, interpreted the provisions of the *statute*, not the regulations.

Respondent further asserts that neither *Cleveland Indians* nor *Auer* distinguish between the standard of deference to be given to an interpretation of a statute and that to be given to an interpretation of a regulation. In fact, in both *Cleveland Indians* and *Auer*, this Court specifically discussed the language of the statutes at issue, found them to be ambiguous and then went on to discuss the language of the regulations at issue. *Cleveland Indians*, 532 U.S. at 215-19; *Auer*, 519 U.S. at 457-61. In *Cleveland Indians*, after finding the regulation to be ambiguous, this Court held that because the IRS had consistently and reasonably interpreted these *regulations*, the IRS' "interpretation [of the regulations] attracts substantial judicial deference." *Cleveland Indians, 532* U.S. at 220. Similarly, in *Auer*, this Court held that because the interpretative rule was "a creature of [the agency's] own regulations, [its] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation,' " the rule was deserving of deference. *Auer*, 519 U.S. at 461. This Court has

consistently distinguished between the deference accorded to an agency's interpretation of a statute and that accorded to an agency's interpretation of its own regulation. The Seventh Circuit has failed to make this necessary distinction.

Moreover, Respondent's position that no such distinction exists underscores the confusion surrounding this subject – *i.e.*, the difference between deference given to an agency's informal interpretation of an ambiguous statute and that given to an agency's informal interpretation of an ambiguous regulation – and suggests that the Petition for a Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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